

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 06.03.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal Nos.580 & 822 of 1994  
and

C.M.P.Nos.7185 of 1994,  
13016 to 13018 of 2005, 5289 of 2004  
and 374 of 2005

in  
S.A.No.580 of 1994  
&

C.M.P.Nos.13019 to 13021 of 2005,  
15825, 15826 of 2005

in  
S.A.No.822 of 1994

1. B.Sivaraman (Died)
2. Lakshmi Sivaraman (Died)
3. Dr.S.Kumar
4. S.Balakrishnan
5. S.Meena

.... Appellants in both S.As

( Appellants 3 to 5 are brought on  
record as LR's of the deceased  
1 and 2 appellant vide order of  
this Court dated 25.08.2005 made  
in C.M.Ps.No.13016 to 13018 of 2005 &  
CMP Nos.13019 to 13021 of 2005)

Vs.

S.Ramalingam

.... Respondent in both S.As

PRAYER IN S.A.No.580 of 1994 & S.A. 822 of 1994: Second Appeal against the  
Judgement and decree passed by the III Additional Judge City Civil  
Court, Madras in A.S.Nos.362 & 363 of 1991, dated 16.09.1993 against the  
Judgment and decree passed by the XII Assistant Judge City Court, Madras,  
in O.S.Nos.2251 of 1985, & 9158 of 1986 the decree dated 22.04.1991

|                 |                                         |
|-----------------|-----------------------------------------|
| For Petitioners | : Mr.S.A.Rajan                          |
| For Respondent  | : Mr.R.Subramanian for<br>Mr.V.Krishnan |

## J U D G M E N T

The legal representatives of the defendants are the appellants in the second appeal. The respondents filed a suit against the defendants in O.S.No.2251 of 1985, against the father and mother of the appellants, who were the sole defendants for an injunction from using a pathway shown as A,B,C,D in the plaint plan, claiming exclusive right. Likewise, he has filed another suit in O.S.No.9158 of 1986 from preventing the plaintiff from using the A,B,C,D pathway to reach the land E,F,G,H. There was a common trial of both the suits and ultimately the Trial Court has dismissed both the suits, as against which the plaintiff filed the first appeal in A.S.No.362 of 1991 and 363 of 1991 respectively and both the appeals were taken together and allowing both the appeals, the First Appellate Court has granted an order of injunction, as prayed for in both the suits by the plaintiffs. It is as against the said judgement and decree of the first Appellate Court, the defendants have filed the above second appeals. Pending the above said second appeals, since the appellants died, their legal representatives have been brought on record.

2. While admitting the second appeal, the following substantial question of law was framed by this Court -  
"is not a purchaser of a property, which forms part of a larger extent of land entitle for passage to have ingress and egress to his property as a matter of necessity under Section 13 of the Easement Act, even though the neighboring owner may be that person's husband."

3. The facts leading to the above said appeals are that the first defendant in the suit B.Sivaraman purchased one housing plot measuring 3483.66 sq.ft. out of 8.5 grounds from one C.L.Rajasekaran under a sale deed executed on 05.12.1973, which is marked as Ex.B1, the Xerox registration copy of which was marked as Ex.A4. That was the property formed part of plot No.7A measuring 79 ft. North to South on both East and Western sides and East-west on the Northern side 44 ft. and on the Southern side 44ft.3 inches measuring a total extent of 3483.66 sq.ft. The second defendant, who is the wife of the first defendant, has purchased one housing plot measuring 1062 sq.ft. out of the said 8.5 ground from C.L.Rajasekaran under a registered sale deed executed on 01.04.1976 and marked as Ex.B3, the registration copy of which was marked as Ex.A5. The said plot purchased by the second defendant is adjacent to the property purchased by the first defendant on its Southern side.

4. The plaintiff's case is that he has entered into an agreement for sale on 13.05.1978 with the common owner of all these properties, namely, C.L.Rajasekaran on 13.05.1978, the Xerox copy of which was marked before the Trial Court as Ex.A1 and according to him as per the agreement, the said C.L.Rajasekaran has agreed to sell the portion of plot No.7A, which also comprised the above said plots purchased by the defendants, measuring 56 ft. East-west on the Northern side, 57 ft. 6 inches East-west on the

Southern side, 66 ft. North to South on the Western side and 61 ft. North to South on the Eastern side measuring 3525 sq.ft. and a pathway having width of 12 ft. running from Moubarys Road first cross street North to South, which is the exclusive access for the plaintiff's use. According to the plaintiff, the said properties stated to have been agreed to be sold by C.L.Rajasekaran in favour of the plaintiff, is situated on the Southern side of the first and second defendants' property and the exclusive pathway claimed by the plaintiff, which is the subject matter of dispute is running North to South on the Eastern boundary of the properties purchased by the defendants.

5. According to the plaintiff, the agreement was entered on 13.05.1978 and thereafter the plaintiff was put in possession on 01.10.1979. It was also his case that subsequently, by mutual agreement between the plaintiff and his vendor C.L.Rajasekaran, the width of the pathway was to be treated as 16 ft. Since the sale was not completed within the stipulated time, the plaintiff has filed the suit in O.S.No.1632 of 1980 in the City Civil Court for specific performance and the suit was decreed on 13.04.1983. According to the plaintiff the decree also provides for 16 ft. passage to the plaintiff as his exclusive passage. After the plaintiff's vendor C.L.Rajasekaran filed an appeal in this Court in A.S.No.613 of 1983, there was a compromise entered and ultimately the plaintiff's vendor has executed a sale deed in favour of the plaintiff on 31.05.1988, which was marked as Ex.A.18. It is the further case of the plaintiff that under the sale deed executed by the common owner C.L.Rajasekaran in favour of the first and second defendants under the sale deeds dated 05.12.1973 and 01.04.1976 no right of passage was given to the defendants in respect of the suit passage. The plaintiffs also state that the common owner has also sold the remaining extent in plot No.7A of the Eastern side to one Mrs.Barathi Reddy. Even though the suit passage exclusively belongs to the plaintiff, the first defendant has opened an entrance illegally to reach his plot and both the defendants have started using the said passage, which resulted in the plaintiff filing the above suits for injunction.

6. The case of the defendants is that the plot purchased by the second defendant, who is the wife of the first defendant on 01.04.1976 under Ex.B.3, was independent of the plot purchased by the first defendant on 05.12.1973 under Ex.B.1. Therefore, according to the defendants, the second defendant is entitled for a right of ingress and egress to her plot as per Section 13 of the Easement Act. It is also the defendants' case that the plaintiff himself has purchased the property from the common owner on 31.05.1988 after both the suits were filed. It is also the defendant's case that the plaintiff has in fact purchased the said property along with his wife Mrs.Amirtham Ramalingam, who has not been made as a party being a co-owner. The Trial Court has dismissed the suit on the ground that the second defendant being the independent owner of the plot has a right of easement to use the passage as a matter of necessity under Section 13 of the Easement Act.

7. On the other hand, the Appellate Court has reversed the judgement of the Trial Court on the basis that the defendants were husband and wife and both the plots were treated as a common and contiguous properties and therefore, there was no question of independent right to the second defendant to have a passage over the exclusive property purchased by the plaintiff under Ex.A.18. Therefore, the question to be decided in these cases is as to whether the defendants, especially the second defendant has a right of common passage over the portion stated as passage belonging to the plaintiff under Ex.A.18 sale deed, dated 31.05.1988.

8. Mr.S.A.Rajan, learned counsel appearing for the appellant would rely upon Section 48 of the Transfer of Property Act, to show that inasmuch as when the previous vendor has executed sale deed in favour of the defendants under Exs.B1 and B3 on 05.12.1973 and 01.04.1976, which was much before the sale deed executed in favour of the plaintiffs under Ex.A.8 and even before the alleged agreement for sale executed in favour of the plaintiff on 13.05.1978, at the time of the sale executed in favour of the defendants such right of passage would not have been in existence because the entire property would have been vacant and it was only after the Ex.A.18 was executed in favour of the plaintiff, later such right should be made available to the defendants being the previous purchasers and their rights having been created previously. He would also submit that as per Section 54 of the Transfer of Property Act, an agreement for sale itself does not create any interest on such property. Therefore, according to him merely because under Ex.A.1, which is only a Xerox copy of an agreement stated to have been entered between the previous vendor and the plaintiff, dated 13.05.1978, one cannot presume that as per the said agreement, exclusive passage would have been given to him. On the other hand, the sale itself was effected on 31.05.1988 when the present suits were pending and that therefore it cannot be said that the plaintiff will have exclusive right over the passage.

9. The learned counsel also would rely upon the terms of Ex.B.1 dated 05.12.1973 and also Ex.B.3 dated 01.04.1976 under which title were conveyed to the defendants by the previous owner, wherein it has been clearly stated in the recitals that the right conveyed under the said sale deeds include "all ways, sewage rights, easements, etc." and therefore, as per the contents of the said documents, the defendants are entitled to use the passage which is under dispute as a common passage. He would also submit that what is claimed by the defendants is not a right of ownership over the passage and it is only a right to use the passage relying upon the terms of Exs.B.1 and B.3. He would also submit that even as per Ex.A.18 sale deed dated 31.05.1988 under which the plaintiff makes a claim, the said sale deed stands not only in the name of the plaintiff but also in the name of Mrs.Amirtham, who is the wife of the plaintiff and inasmuch as they are the joint owners, not impleading the said Mrs.Amirtham will hit the suit for non joinder of necessary parties.

10. The learned counsel also would submit that the defendants only dispute the plaintiff's claim of exclusive right of the ownership over the passage, since they have the right of usage. He would also submit that inasmuch as at the time when the second defendant has purchased the property under Ex.B.3 from the common owner on 01.04.1976, there was no occasion for the second defendant or defendants for that matter to claim the right of passage, since at that time the plaintiff has never been in possession of the property nor any right or interest or title has been created in his favour and admittedly, the sale deed itself came to be executed by the common vendor in favour of the plaintiff much later only on 31.05.1988. Therefore, this is a case, which is covered under Section 48 of the Transfer of Property Act.

11. The learned counsel also to substantiate his contention would rely upon the judgement of this Court reported in AIR 1970 Madras 226 and AIR 1966 Andrapradesh 233. He would also rely upon Sections 13A and 13B of the Indian Easement Act 1982 and illustration-A given to the said Section. It is to substantiate his contention he would rely upon the judgement of this Court reported in AIR 1960 Madras 124, apart from AIR 1981 Allahabad 99. He would also submit that the first Appellate Court has failed to consider that the defendants 1 and 2 being the husband and wife are independent, having purchased properties under independent documents and it can never be said simply because it is the adjacent property and therefore, the first defendant having a right of access on the main road in respect of his property and therefore it should be deemed that the second defendant being his wife is also entitled to use the same and not claiming the right of common passage.

12. He would also rely upon the evidence of P.W.3, who is the common vendor, who has agreed that while selling the properties to the second defendant under Ex.B.3, he has not given any right of passage but at the same time the second defendant has not given any undertaking. She would not use the 16 x 106 passage. He would also rely upon the further statement of P.W.3 whereby he has admitted that he has not received any consideration for the passage from the plaintiff. He would also state that a contrary intention has already been in the mind of the vendor, since P.W.3 has admitted that at the time when he sold the portion of his property to the first defendant under Ex.B.1, he has intended to use the remaining land measuring 16 x 106 on the Eastern side as a passage.

13. On the other hand Mr.R.Subramaniam, learned counsel for the respondent would submit that the plea of non joinder of the wife of the plaintiff is taken for the first time in the second appeal, since according to him that plea is not maintainable for the simple reason that a co-owner can always maintain a suit against the trespasser, since according to the learned counsel, the defendants are attempting to make claim on the passage exclusively belonging to the plaintiff and therefore the defendants can only be treated as trespassers. He would also submit that even under the Ex.B.1 sale deed dated 05.12.1973 executed by the

common vendor in favour of the first defendant, the Eastern and Southern boundary of the said property is only stated as a part of plot No.7A and no pathway has ever been shown. Likewise, he would also submit that even in respect of the Ex.B.3 sale deed dated 01.04.1976 under which the common vendor has executed a sale in respect of the second defendant, the Eastern and Southern boundary are stated as part of plot No.7A apart from specifically stating that the Northern boundary of the said property comprised in plot No.7A/2 is contiguous to it on the South and therefore, the intention was that both the plots given to first and second defendants were to be used as contiguous and inasmuch as the first defendant has got a right of access on the Mowbary's Road first cross street, Sitharanjan Road, the claim of the second defendant is only infructuous, since the second defendant has never been in use of the said passage.

14. He would also rely upon the evidence of P.W.3 the common vendor who has admitted that the right of passage was not given to the defendants, since the same was not in existence in 1976 and the same was forming part of plot No.7A. According to the learned counsel, if the vendor has not conveyed any right, Section 48 of the Transfer of Property Act, has no application. He would also submit that even though under the agreement dated 13.05.1978 the width of the passage was stated as 12 ft., which was subsequently enlarged by 16 ft., since the vendor has on the Eastern side, given another 4 ft. from his property. He would rely upon various endorsements made by the vendor in the agreement, dated 13.05.1978 out which in one of the endorsement on 01.10.1979, the vendor has specifically stated that he has handed over possession of the site mentioned in the agreement and the plaintiff has taken possession and it was in that endorsement it is stated that by mutual agreement between the vendor and plaintiff, the width of the passage has been increased to 16 ft. for the purpose of enjoyment in common by the vendor and the purchaser. Therefore, according to the learned counsel for the respondents, this was only intended for the use by the vendor, who was having the property on the Eastern side, which was in no way connected with the properties of the defendants at all.

15. He would also submit that in the report of the Advocate Commissioner filed in the above cases, the Commissioner has clearly stated that when he inspected the backyard of the first defendant's building, on the Eastern side there was a car shed, which is partly covered in the plot owned by the second defendant in the back and therefore, according to the learned counsel for the respondents, the defendants have been jointly using the property as a contiguous one and the second defendant has no necessity of easement at all as per Section 13 of the Indian Easement Act. He would also refer to the written statement filed by the defendants wherein the defendants have claimed right of adverse possession over the passage, which has not been proved.

16. I have heard the learned counsel for the appellant and respondents and perused the entire records.

17. As far as the claim of the defendants to have the right of use of passage on the Eastern side of their properties covered under sale deed Ex.B.1 and B.3, it is not in dispute that under Ex.A.18 sale deed dated 31.05.1988 the previous vendor while selling the plot of the property, which are all originally, formed part of plot No.7A, it contains a specific clause of right of exclusive use of passage by the plaintiff. It is not in dispute that the entire properties originally belonged to the common owner C.L.Rajasekaran, who has given evidence as P.W.1 on the side of the plaintiff. In addition to the contents in the sale deed under Ex.A.8 given in favour of the plaintiff, P.W.3 has also given specific evidence that he has not given any right of usage to the defendants in the 16 ft. passage, since the defendants' property especially the plot sold to the first defendant under Ex.B.1 is facing the main road. He would also state that even in respect of the portions sold by him on the Eastern side to Mrs.Barathi Reddy, he has not given any right of usage of the passage. Even though as P.W.3 the vendor would admit that he has not received any sale consideration for the exclusive right having conferred to the plaintiff, it is nevertheless the categoric evidence as it is seen in the document Ex.A.18 that his intention was to give the said passage exclusively to the plaintiff. Merely because, the vendor P.W.3 has not taken an undertaking from the defendants that they would not claim right of use of passage on Eastern side of the properties sold to them itself would not confer a right of usage of the passage, which is admittedly exclusively sold under the sale deed to the plaintiff under Ex.A.18.

18. Even though it is true that the previous vendor has merely entered an agreement with the plaintiff on 13.05.1978, the Xerox copy of which has marked as Ex.A.1, a reference to Ex.A.18 sale deed dated 31.05.1988 executed by the previous vendor in favour of the plaintiff, in fact refers about the agreement entered between them on 13.05.1978 agreeing to sell the property and also in respect of the said agreement, there was a suit for specific performance between the plaintiff and the previous vendor, which has entered in a compromise in A.S.No.613 of 1983 before this Court and a memo of compromise was filed on 28.04.1988 based on which the sale deed under Ex.A.18 was executed. In addition to the contents of the Ex.A.18 the evidence of P.W.3, namely, the vendor, who has executed A.18 clearly proves that as per the said agreement the vendor P.W.3 has given possession of the property under Ex.A.18 to the plaintiff as early as in 1979, by giving 16 ft. width of passage to be exclusively used by the plaintiff. Therefore, the reliance placed on by the learned counsel for the appellant under Section 58 of the Transfer of Property Act, wherein it states that the contract for sale of immovable property itself does not create a charge on such property, is not sustainable, for, that provision will apply only in cases where an agreement holder in respect of immovable property claiming right by virtue of the said agreement alone.

19. In the present case, the vendor himself has conferred the right and therefore, the terms have been settled between the vendor and the plaintiff in clear terms. On the above said factual background, it is now relevant to consider the contentions raised by the learned counsel for the appellant placing reliance on Section 48 of the Transfer of Property Act. Section 48 of the Transfer of Property Act states as follows:

"48. Priority of rights created by transfer.-

Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, but subject to the right previously created."

20. As it is correctly pointed out by the learned counsel for the appellant himself that very basis of the said Section is founded on the principle that no man can convey better title than he has. Therefore, the basic concept is that when once a person has already effected transfer, he cannot go back from such transfer or grant and dealing with such property fully as he likes, since by virtue of earlier transaction he has lost his right over the properties. In the present case even applying the test formulated under Section 48 of the Transfer of Property Act, when admittedly, the previous vendor P.W.3 has already executed sale deed in favour of the defendants 1 and 2 earlier on 05.12.1973 and 01.04.1976 under Ex.B.1 and B.3 respectively, in respect of different portions of the same property belong to him and at that time there was no passage available or in existence and subsequently, when the same vendor has created Ex.A.18 in respect of different portions of his property, even assuming that Section 48 of the Transfer of Property Act is applicable, by virtue of specific provision under Ex.A.18 that the passage mentioned under the said document, which is the subject matter of dispute shall be exclusively used and owned by the plaintiff and therefore, it should be taken as a special contract or reservation entered by the vendor with the plaintiff, which is binding on the defendants.

21. In any event, Section 48 applies only in respect of the conduct of a person, who is creating different transfer at different times over the same immovable property and later when he creates any right in favour of a transferee, such right will be subject to the rights of the previous owners in whose favour the rights were created, provided there are no special contract or reservation to the contrary binding on the earlier transferees. Therefore, in the present case apart from the fact that the contents of Ex.A.18 along with the evidence of P.W.3 shows that there is a special contract or reservation, which is being on the earlier transferees, namely, the defendants. It is clear that on fact no right of usage of passage as ever been created or given in favour of the defendants by the vendor at any point of time. Therefore, the reference made by the learned counsel for the appellant on the judgement of this court rendered

in S.Arunachalam Asari (died) and others Vs. Sivan Perumal Asari and another reported in AIR 1970 Madras 226 has no application. As rightly pointed out by the learned counsel for the appellant himself, that was the case wherein while construing about the contents of the previous documents in the light of Section 47 of the Registration Act, this Court has held that the prior transferee will be entitled to enforce the right of priority even if the subsequent transferee has no knowledge of the prior transaction. Moreover, that was the case of construction of priority right over the plaintiff under the mortgage deed marked as Ex.A.4 to that of the second defendant's sale under Ex.B.4 and this Court has held by applying the rule under Section 48 of the Transfer of Property Act, that the subsequent document Ex.B.4 must necessarily yield to Ex.A.4 which is previously created mortgage deed in respect of the same property.

22. It was while construing Section 47 of the Registration Act, and 48 of the Transfer of property Act, this Court has held as follows:

10. From the foregoing it will be seen that the prior transferee will get priority, the moment his deed of transfer is registered. This right of priority is the direct consequence of S.47 of the Registration Act, and S.48 of the Transfer of Property Act. The fact that a subsequent transferee is a bona fide transferee is not a ground by itself for postponing the rights of a prior transferee. The normal rule is that no man can derogate from his own grant, and whenever the Legislature wanted to protect the rights of a subsequent transferee in good faith and for consideration specific provision has been enacted. In all other cases, the right of priority embodied in S.48 of the Transfer of Property Act would apply. The right of priority of the prior transferee will be postponed only if he is guilty of any fraud, misrepresentation or gross negligence. The prior transferee cannot be said to be guilty of any negligence merely because he takes his own time to get the document registered, within the time allowed by the statute. By that conduct of waiting which the statute permits him, he could not be said to be facilitating the owner of the property to commit fraud. What a man does, what the law of the land permits him to do cannot amount to gross negligence. A subsequent transferee must necessarily take the risk of the owner having entered into a prior transaction concerning the property and that transaction remaining unregistered but being completed, by registration, subsequent to the second transaction. That is an inevitable risk which the subsequent transferee must take by reason of the specific provision in S.47 of the Registration Act. In the instant case, there is no question of the plaintiff being guilty of any gross negligence and his rights of priority will have to be recognised under Sec.48 of the Transfer of Property Act."

23. Apart from the fact that, that was relating to two documents in respect of the same property one in respect of mortgage and another in respect of sale, the court by applying Section 47 of the Registration Act, along with Section 48 of the Transfer of Property Act, has held that the prior document, namely, mortgage deed in respect of the same property will have priority. I am afraid that the said judgement cannot have any application to the facts and circumstances of this case.

24. Even in the judgement relied upon by the learned counsel for the appellant reported in The State of Andra Pradesh, Rep.by the District Collector, Guntur Vs. Rajah Ram Janardhana Krishna Rangarao Bahadur and others reported in AIR 1966 Andra Pradesh 233 while referring to Section 48 of the Transfer of the Property Act, the Division of the Andrapradesh High Court by holding the intent of the said Section has held as follows:

"(18) This Section reproduces the well established equitable maxim "qui prior est tempore potior est jure" and lays down that the transferor cannot prejudice the rights of the transferee by any subsequent dealing with the property. In other words, if there are successive transfers of the same property, the later transfer is subject to the prior transfer. It follows that in the case of two successive mortgages the later or puisne mortgage is subject to the prior mortgage."

25. It makes very clear that the said section is applicable only there are successive transfer of the same property. In the present case admittedly, the property transferred to the defendants under Ex.B.1 and B.3 and the plot transfer to the plaintiff under Ex.A.18 are distinct and different in nature. Therefore, there was no question of application of Section 48 of the Transfer of Property Act, on the facts and circumstances of the case.

26. As far as the next legal point raised by the learned counsel for the appellant by placing reliance on Section 13 of the Easement Act 1882, it is relevant to extract Section 13A and B, which runs as follows:

"13 (a) If an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or"

27. The written statement filed on behalf of the defendants specifically states that the defendants have been using continuously the pathway for over the statutory period and this was the only pathway, which is available for the defendants to enjoy their property. Even though the

defendants would rely upon the usual contents under Ex.B.1 and B.3 about the rights of easement, since the defendants have come forward with a specific plea that they have been using the passage for more than statutory period and that the passage is the only way of ingress and egress, it is for the defendants to prove the same with evidence.

28. The Advocate Commissioner's report Ex.C.1 shows that the gate stated to have been put by the defendants to reach the disputed passage is of recent origin. The learned Advocate Commissioner in his report specifically states as follows:

"The open backyard as a rear of the building beyond the cement platform owned by the second defendant, who is the wife of the first defendant, which is not as if it cannot be approached excepting through the suit pathway. There is adequate width on the Eastern side where there is a big car shed"

He also specifically states in respect of the car shed as follows:

"On the Eastern side of the building there is a car shed 17ft. 6 inches long closed by rolling shutters, there is an asbestros roofed area for 32 ft. 5 inches supported by 3 iron pipes after the car shed, there is thus adequate space to park vehicles on the Eastern side, the car shed partly covers over the plot owned by the second defendant in the back."

29. Therefore, even though it is the evidence of the first defendant as D.W.1 that ever since the date of purchase, the second defendant has been using the passage, it is not substantiated by any independent evidence. That apart, the Advocate Commissioner's report is clear that there is no trace of having used the passage by the defendants for more than the statutory period as specifically pleaded. Therefore, it cannot be said as if the passage was the only passage, which is of necessity. As far as Section 13B is concerned, the same is applicable only in cases where apparently the court comes to a conclusion that out of necessity the easement has been used continuously and in the present case as I have stated, there is absolutely no evidence to show that there has been a continuous use by way of necessity.

30. On the other hand, the different intention is obviously seen by the conduct of the vendor P.W.3 in executing sale deed in favour of the plaintiff under Ex.A.18 dated 31.05.1988, which can be safely presumed to be in continece of the agreement dated 13.05.1978 which is also mentioned under Ex.A.18. In the absence of any positive proof on the side of the defendants that the passage has been used for a long time by way of adverse possession, even though it is the contention of the learned counsel for the appellant that what is claimed by the defendants is only a right of use and not right of ownership, on the face of the pleadings, there is absolutely no difficulty to come to the conclusion that the

defendants who have come forward with a specific pleading of adverse possession have failed to prove the same that they have been in continuous use of the suit passage for more than the statutory period.

31. In such circumstances, there was absolutely no question of easement of necessity that arise for consideration in this case. As correctly pointed out by the learned counsel for the respondent, the judgement rendered by the Allahabad High Court in Smt.Narayana Devi Vs. Poolchand and another reported in AIR 1981 Allahabad 99 has no application, since the said judgement refers to the fact wherein the transferor has been enjoying the adjacent side of the property as an easement of necessity before transfer and in such circumstances the transferee would be deemed to have established a right of easement of necessity. On the facts of the present case, it is not as if P.W.3 has been using the said suit property as a common passage, even though he would also state that he had the intention of using the same as a common passage. Likewise, the judgement of this Court relied upon by the learned counsel for the appellant in Ramasamy and others Vs. Munisamy and others reported in AIR 1960 Madras 124 also has no application, since that relates to quasi easement relating to right of irrigation from well water.

32. In view of the facts and circumstances, there is absolutely no question of law involved in these cases much less any substantial question of law and therefore, the second appeals fail and the same are dismissed. The party shall bare their respective costs. Consequently, the connected C.M.Ps are closed.

nbj

Sd/  
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. THE XII ASSISTANT JUDGE,  
CITY CIVIL COURT, CHENNAI

2. THE III ADDITIONAL JUDGE  
CITY CIVIL COURT, CHENNAI.

3. THE REGISTRAR, CITY CIVIL COURT, CHENNAI.

4. THE SECTION OFFICER,  
V.R. SECTION, HIGH COURT, CHENNAI.

+ One cc to Mr. V. Krishnan Advocate SR 13854

PV (co)

sg 23/3/07

Order in  
S.A.Nos.580 & 822 of 1994  
06.03.2007